**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. Boutilier*, 2017 NSSC 308

**Date:** 20171129
**Docket:** CRH No. 458697
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Cecil Boutilier

| | |
|---|---|
| **Judge:** | The Honourable Justice James L. Chipman |
| **Heard:** | November 29, 2017, in Halifax, Nova Scotia |
| **Written Release:** | November 30, 2017 **(Orally: November 29, 2017)** |
| **Counsel:** | William Mathers, for the Crown<br>Colin James Coady, for the Defence |

**Orally by the Court:**

[1] By Indictment dated January 11, 2017, Mr. Boutilier was charged with eleven counts in relation to an August 9, 2015 vehicular homicide resulting in the death of Harry Blackburn. The matter was set for trial with a fifteen-day Judge alone trial in the Supreme Court of Nova Scotia scheduled for November 20 – December 1, 2017. On June 29, 2017, based on an Agreed Statement of Facts ("ASF"), Mr. Boutilier entered guilty pleas to the following:

a. Criminal negligence causing the death of Harry Blackburn contrary to s. 220(b);

b. Having care and control of the vehicle that was involved in an accident, with intent to escape civil or criminal liability, did fail to stop that vehicle and give his name, address or offer assistance to Harry Blackburn, contrary to s. 252(1); and

c. Theft of a motor vehicle, contrary to s. 333.1.

[2] The conviction under s. 220(b) is the most serious count to which Mr. Boutilier has plead guilty. It does not carry a mandatory minimum term of imprisonment; however, the section allows for life imprisonment. Similarly, given the conviction under s. 252(1), if the Court accepts that either of the conditions set out under s. 252(1.3) are met, then Mr. Boutilier is also liable for life imprisonment on this count. In the alternative, Mr. Boutilier is liable for a term of imprisonment not exceeding five years for the s. 252(1) count. The s. 333.1 count carries a maximum punishment for ten years.

**Materials Received**

[3] In advance of today's sentencing, the Court has before it a number of materials for consideration; namely:

a. Exhibit "J-1", the ASF and attached coloured photographs and video;

b. May 19, 2008 transcript of Mr. Boutilier's Provincial Court sentencing;

c. March 30, 2016 Victim Impact Statement ("VIS") of Carolyn Tina Beaton, Mr. Blackburn's sister;

d. August 23, 2017 Pre-Sentence Report ("PSR") prepared by Probation Officer, Jennifer Keeler;

e. October 6, 2017 Offender Incidents Report

f. November 7, 2017 Impact of Race and Cultural Assessment Report ("IRCA Report") prepared by Robert S. Wright, MSW, RSW;

g. November 10, 2017 (date received) *Gladue Report* prepared by Margaret White;

h. November 15, 2017 Justice Enterprise Information Network ("JEIN") Bail Report with respect to Mr. Boutilier

i. November 17, 2017 Crown submissions on sentence;

j. November 20, 2017 Defence submissions on sentence; and

k. November 24, 2017 letter from the Crown.

**ASF**

[4] The facts on this sentencing were negotiated between the parties and the ASF (with attached photographs and video) was tendered as Exhibit J-1 on the change of plea to guilty on counts 1, 3 and 5 of the eleven count Indictment. The ASF reads as follows:

> Pursuant to section 655 of the *Criminal Code*, Cecil Boutilier ("Mr. Boutilier") admits the facts set out below for the purpose of dispensing with proof thereof at trial:
>
> 1. THAT shortly after 11:00 PM on August 9th, 2015 Mr. Boutilier stole a white Chevrolet van (the "Van") valued at $6995.00 from "No Bull Auto" located at 338 Windmill Road in Dartmouth, Nova Scotia;
>
> 2. THAT at all material times Mr. Boutilier was the driver of the Van;
>
> 3. THAT the owners of "No Bull Auto" (the "Owners") saw the Van leave the dealership and collide with a pole (the "First Collision");
>
> 4. THAT the pictures appended to these Facts marked as "001" and "002" are true and accurate depictions of the damage caused by the First Collision;

5. THAT the Owners chased the Van in their vehicles as Mr. Boutilier left the dealership, and the scene of the First Collision, at a high rate of speed;

6. THAT Mr. Boutilier drove the Van approximately 1.8 kilometres, while being pursued by the Owners, to the intersection of Windmill Road and Victoria Road;

7. THAT on reaching the intersection of Windmill Road and Victoria Road, Mr. Boutilier cut over the curb and across the grass bordering Victoria Road, where he struck a Volkswagen car, driven by Harry Blackburn, (the "Volkswagen"), which was stopped at a red light on Victoria Road (the "Second Collision");

8. THAT the pictures appended to these Facts marked as "023" and "028" are true and accurate depictions of the path of the Van as it cut across the grass between Windmill Road and Victoria Road;

9. THAT the picture appended to these Facts marked as "038" is a true and accurate depiction of the point where the Second Collision occurred;

10. THAT the pictures appended to these Facts marked as "145", "146", and "147" are true and accurate depictions of the intersection of Windmill Road and Victoria Road;

11. THAT the force of the Van striking the Volkswagen was such that the Volkswagen was driven across five lanes of traffic, as well as the median, and onto the grass of the Farley and Stevens Ford Dealership, across the road;

12. THAT the pictures appended to these Facts marked as "041" and "044" are true and accurate depictions of the path of the vehicles described in paragraph 11;

13. THAT the pictures appended to these Facts marked as "071", "072" and "082" are true and accurate depictions of where the Van and the Volkswagen came to rest, as well as the damage sustained in the Second Collision to each of the vehicles;

14. THAT in the 5 seconds prior to the Collision, the Van's speed was as follows:

i) 122.31 km/h at 5 seconds prior to impact;
ii) 123-92 km/h at 4 seconds prior to impact;
iii) 122.31 km/h at 3 seconds prior to impact;
iv) 101.39 km/h at 2 seconds prior to impact;
v) 88.51 km/h at 1 second prior to impact;

15. THAT the speed limit along Windmill Road approaching the intersection of Windmill Road and Victoria Road is 50 km/h;

16. THAT at all material times Mr. Boutilier's operation of the Van was criminally negligent, within the meaning of s. 220(b) of the Criminal Code.

17. THAT immediately after the Collision, Mr. Boutilier abandoned the Van and fled on foot;

18. THAT a K-9 Unit tracked Mr. Boutilier from the Farley and Stevens Ford Dealership, through the tree line at the rear of the dealership, and into a bordering container storage compound, where Mr. Boutilier was spotted, running away;

19. THAT the K-9 officer deployed the Police Service Dog who bit Mr. Boutilier and took him to the ground;

20. THAT the pictures appended to these Facts marked as "138", "141" and "143" are true and accurate depictions of the contents of Mr. Boutilier's backpack, which was recovered from the Van;

21. THAT at 1:10 AM on August 10th, 2015, Harry Blackburn died as a result of the injuries he sustained in the Second Collision;

22. THAT the attached video, marked as "Intersection Video" is a true and accurate recording of the Second Collision;

23. THAT at all material times Mr. Boutilier was disqualified from driving within the meaning of s. 259 of the Criminal Code; and,

24. THAT at all material times Mr. Boutilier was bound by a Probation Order imposed August 12, 2014 which required him to "keep the peace and be of good behavior".

## Positions of the Parties

Crown

[5] The Crown's recommendations on sentence are summarized at paras. 35 and 36 of their brief:

> Mr. Boutilier is an incorrigible car thief who shows no hesitation in putting other drivers at risk when pursued by the police or vehicle owners. Accordingly, while the principles of denunciation, deterrence and rehabilitation should be given some emphasis, primary consideration should be given to the separation of Mr. Boutilier from society. It is the Crown's submission that only this separation will ensure the public's safety: no amount of denunciation, deterrence or rehabilitation will cause Mr. Boutilier to internalize society's boundaries with respect to offences of this type. Accordingly, the Crown is seeking a custodial sentence of eleven years, less credit for time served. The Crown recommends that sentence be broken down as follows:

| Count | Charge | Sentence |
|---|---|---|
| Count 1: s. 220(b) | Criminal Negligence Causing Death | 10 years |
| Count 2: 252(1) | Failing to Stop | 1 year consecutive |
| Count 3: 333.1 | Theft of Motor Vehicle | 6 months concurrent |

…

[6] The Crown also seeks the following ancillary orders:

i.DNA Order (primary designation) on Count 1; and

ii.s. 259 Order (life)

[7] In support of it's position that Mr. Boutilier should receive 11 years incarceration, the Crown refers to these cases:

*R. v. Jones*, [1994] S.C.J. No. 42

*R. v. Gardiner*, [1982] 2 S.C.R. 368

*R. v. Ostertag*, 2000 ABCA 232

*R. v. Packwood*, [1993] B.C.J. No. 1628

*R. v. S.(J.J.)*, [1999] O.J. No. 1545

*R. v. McNabb*, [2013] S.J. No. 732

*R. v. Akapew*, [2009] SKCA 137

*R. v. Gladue*, [1999] 1 S.C.R. 688

*R. v. Ipeelee*, 2012 SCC 13

*R. v. Assiniboine*, 2016 SKQB 149

*R. v. Lawson*, 2012 BCCA 508

*R. v. Florence*, 2013 BCSC 194

Defence

[8] The Defence makes the following pitch in the last para. of his brief:

> Defence would respectfully submit that a four (4) year sentence is fit and appropriate in these circumstances. When reviewing the totality of the circumstances, including the mitigating factors and sentencing principles, especially s. 718(2)(e), defence would respectfully submit that such a disposition

> would not be contrary to the public interest, not would it bring the administration of justice into disrepute.

[9] In oral argument the Defence points out that the circumstances of this case do not involve flight from the police. They emphasize parity and suggest the range in Nova Scotia is in the realm of 4 – 6 years for like cases.

[10] The Defence submits the four year sentence should be broken down as follows:

a. s. 220(b) – 4 years;

b. s.252(1) – 1 year, concurrent; and

c. s. 333.1 – 6 months, concurrent

[11] In making their recommendation, the Defence emphasises the *Gladue* Report and IRCA Report, as well as these cases:

*R. v. Linden*, [2000] O.J. No. 2789

*R. v. Spears*, [2010] O.J.No. 2453

*R. v. J.A.W.*, [2000] B.C.J. No. 1112

*R. v. Bear*, [2008] S.J. No. 815

*R. v. Hayes*, [1994] O.J. No. 3898

*R. v. Shore*, [1999] O.J. No. 1545

*R. v. Woodley*, [1993] M.V.R. (2d) 51 (B.C.C.A.)

*R. v. C.J.W.* [2000] A.J. No. 961

*R. v. MacEac*hern, (N.S.C.A.) [1990] N.S.J. No. 82

*R. v. Selig*, (N.S.C.A.) [1990] N.S.J. No. 436

*R. v. Shand*, [1997] N.S.J. No. 63

*R. v. A.A.B.*, [2006] N.S.J. No. 80

*R. v. Polley*, [2014] N.S.J. No. 403

*R. v. Antunes*, [2013] B.C.J. No. 678

*R. v. Watson*, [1992] B.C.J. No. 2909

*R. v. Wymer*, [1998] B.C.J. No. 2164

*R. v. Galloway*, [2004] S.J. No. 528

*R. v. Kang*, [2014] S.J. No. 270

*R. v. Skinner*, [2016] NSCA 54

*R. v. Hatch*, [1979] N.S.J. No. 520

*R. v. Jacko*, 101 O.R. (3d) 1

*R. v. Wells*, [2000] N.S.J. No. 5278

*R. v. Carvery*, [2012] N.S.J. No. 527

Remand Time

[12] In addition to their disagreement on an appropriate sentence, the parties are at odds with respect to pre-trial credit or remand time. In this regard, the Crown says as follows at pp. 9 and 11 of their brief:

> Mr. Boutilier's disciplinary history, while on remand, is such that he is unable to meet the onus upon him and secure enhanced remand credit pursuant to ss. 719(3) & (3.1).
>
> …
>
> In contrast, Mr. Boutilier's incident history while on remand is a lengthy one. Moreover, it includes not merely incidents of minor disciplinary infractions or drug possession, but of weapons possession and violence. While in some cases the Crown will rely on incident reports or a letter from the institution, in this case the Crown intends to call an officer from Correctional Services to testify to the disciplinary levels on Mr. Boutilier's record. Given this disciplinary history it is the Crown's position that the inference cannot be made that Mr. Boutilier has lost eligibility for parole or early release.

[13] The Crown goes on to suggest 1:1 credit as follows at p. 11 of their brief:

> As of November 29, 2017 Mr. Boutilier will have been in custody for 844 days, from August 9, 2015. However, he was sentenced to 75 days on November 15, 2016 – leaving 769 days credit at 1:1.

[14] As for Mr. Boutilier, he submits that his institutional incidents should not deprive him of enhanced credit of 1:1.5 days. At paras. 93 and 94 of his brief, the following is stated:

> Therefore, based on Mr. Boutilier already having received institutional punishment for his misbehavior – most often confinement and segregation – defence stressfully argue he should be given the benefit of his enhanced credit for pre-trial custody.
>
> Defence would also respectfully submit that the traumatic nature of his multiple transfers which has a profound effect on his rehabilitation, mental, spiritual and physical health and should also be considered as a reason to provide him with enhanced credit.

[15] The Defence goes on to submit if the Court is to grant Mr. Boutilier enhanced credit for his pre-trial custody then his credit (769 x 1.5) will equate to 1,154 days; i.e., 37.93 months or 3.16 years.

**Evidence Received**

[16] In addition to written submissions and oral argument on the appropriate range of sentence, the Court received *viva voce* evidence. In this regard, the Crown subpoenaed Captain Andrew Miller and the author of the IRCA Report, Mr. Wright. With respect to the latter, the Crown sought leave to cross-examine Mr. Wright. In this regard, the Crown took the position that Mr. Wright, a social worker, "went far beyond the scope of his expertise, and the Court's Order, in diagnosing Mr. Boutilier with a traumatic brain injury, and then ascribing aspects of Mr. Boutilier's behavior to that injury." With respect to the Supreme Court Order dated August 24, 2017, the second and key recital reads:

> AND WHEREAS Cecil Anthony Boutilier has applied to this court for an order that would require the preparation of a cultural assessment report regarding his African Nova Scotian background, including the following cultural and racial factors which are suggested to be systemic in nature, but may also have individual impacts on his:

1. Poverty/low income;
2. Poor educational outcomes;
3. Community fragmentation;
4. Historical and contemporary impacts of racialized and intergenerational trauma;
5. Overrepresentation of African Nova Scotians in the criminal justice system, where there remains little to no culturally relevant programming; and
6. The clinical/mental health implications to black males' psychological and global functioning.

[17] By letter dated November 24, 2017, the Crown raised an additional ground on which to exclude the IRCA Report. Whereas the Order's key recital reads as above, the Crown noted that the Order ought to have reflected what was read into the record during an earlier Crownside appearance on August 10, 2017; namely:

> Under s. 721(4) the Court is requiring that as part of the pre-sentence report that a cultural assessment be prepared. The cultural assessment will examine the role played by Mr. Boutilier's cultural background with respect to this offence. The report should be completed by an individual or individuals with specialized knowledge, education and experience in the completion of such reports relating to systemic and background factors affecting the African-Nova Scotian Community.

[18] The Crown argued that the Order was "substantially different in form and substance" because Mr. Wright was specifically tasked to author the report, and:

> The court's written order also contains statements such as the "overrepresentation of African Nova Scotians in the criminal justice system, where there remains little to no culturally relevant programming" which would ordinarily be up to the defence to establish, not the court to order.
>
> Accordingly, the Cultural Assessment should be excluded or, in the alternative, those sections referring to the alleged brain injury/mental illness should be excised.

[19] Having reviewed the above along with oral argument, I ruled that the August 24, 2017 Court Order would stand. Nevertheless, the Crown was permitted to cross-examine Mr. Wright.

[20] Mr. Wright was cross-examined with respect to his training and qualifications, particularly in the area of neurology and neuropsychology. On the basis of cross-examination and having reviewed Mr. Wright's qualifications, I

decided that certain portions of the IRCA Report had to be redacted and excluded from consideration; i.e., those sections dealing with traumatic brain injury.

[21] I disregarded the redacted portions of the IRCA Report as Mr. Wright strayed beyond his qualifications and failed to meet the tests set by the Supreme Court of Canada in *R. v. White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 and *R. v. Abbey*, 2017 ONCA 640.

[22] In particular, the problems with these portions of the IRCA Report are as follows:

1. Mr. Wright, the author of the Cultural Assessment, is not a medical doctor, much less a physician with advanced training as a neurologist or neuropsychologist;
2. No MRI, CAT, DTI or other brain scan was performed and analyzed by a specialist which revealed lesions, inactive areas, or other damage to those areas of the brain, such as the frontal lobes, which control behavior;
3. No medical opinion has been obtained which provides the causal link between damage to specific areas of Mr. Boutilier's brain, if such damage exists, and his criminal offending; and,
4. This medical opinion was not ordered by the court.

[23] Absent these sections, I am satisfied that the IRCA Report is in compliance with the Order. Mr. Wright is clearly an author with the proper credentials and, in all the circumstances, I have no difficulty with permitting the IRCA Report to be entered into the record, with the aforementioned redactions. To the extent Mr. Wright strays beyond his expertise in the remaining body of his report, I regard these portions as having less weight.

## ***Gladue* and *Ipeelee* Sentencing Principles**

[24] In *R. v. Denny*, 2016 NSSC 76, Justice Rosinski had cause to consider *Gladue* and *Ipeelee* and his comments at paras. 62-70 are helpful in providing relevant background in this case:

> 62 The court has available to it, and is grateful for, a *Gladue* Report prepared through the auspices of the Mi'kmaq Legal Services Network, and signed by Ms. Elizabeth Marshall. That report is particularly helpful in assessing how section 718.2(e) of the *Criminal Code* should be applied in this case.
>
> …

64 Since July 23, 2015, the subsection reads:

> All available sanctions, other than imprisonment, that are reasonable in the circumstances *and consistent with the harm done to victims or to the community* should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

65 In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada set out the principles that should guide courts in relation to the application of the then extant s. 718.2(e). More recently, in *R. v. Ipeelee*, 2012 SCC 13 (at paras. 56 - 87), the Supreme Court revisited and reformulated those principles, particularly as applicable in the context of aboriginal offenders who were subject to long-term offender supervision orders.

66 The majority opinion made the following observations:

> ... s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing... [It] directs sentencing judges to pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique and different from those of non-aboriginal offenders... When sentencing an aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection... Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people generally, but additional case specific information will have to come from counsel and from the presentence report...
>
> ... to be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, high rates of substance abuse and suicide, and of course higher levels of incarceration for aboriginal peoples. These matters, on their own, and do not necessarily justify a different sentence for aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case specific information presented by counsel... In current practice, it appears the case specific information is often brought before the court by way of a *Gladue* Report, which is a form of presentence report tailored to the specific circumstances of aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at the sentencing hearing for an aboriginal offender, as it is indispensable to a judge in

> fulfilling his duties under s. 718.2(e) of the *Criminal Code*." -- Paras. 59 - 60.

...

Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

...

> First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness... The second set of circumstances -- the types of sanctions which may be appropriate -- bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself... s. 718.2(e) does not create a race-based discount on sentencing. -- Paras. 72-75.

67 Furthermore, the court reiterated that it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. Section 718.2(e) does not logically require such a connection:

> Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. That is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.(para. 83)

68 *Gladue* reports are, "a form of presentence report tailored to the specific circumstances of Aboriginal offenders" -- *Ipeelee*, para. 60. For this reason, it may be helpful for such report writers to follow more closely the model adopted for presentence reports, with necessary modifications.

69 I agree with the comments of the court in *R. v. Lawson*, 2012 BCCA 508, at paras. 26-28:

> ... Their purpose is to provide the court with individualized information about how intergenerational and systemic effects of colonialism, displacement, residential schools, poverty, unemployment and substance abuse have affected the aboriginal offender. They should also include information about realistic restorative or rehabilitative programs suitable to the particular aboriginal offender.
>
> ...
>
> Finally, as a form of presentence report, *Gladue* reports should be subject to the same general requirements of balance and objectivity as

> conventional presentence reports. Thus, the writer should attempt to remain detached rather than advancing personal opinions.
>
> 70 Courts have also been consistent in confirming that it is the contents of a *Gladue* report that are critical, not its format, and that such content can come before the court outside of any formal *Gladue* report, or even if none is formally submitted -- by way of counsel's representations, agreed statement of facts, or in presentence reports, etc.

[25] In *Gladue*, the Supreme Court explained the purposes of s. 718.2(e), as applied to aboriginal offenders, and set out a "methodology" for sentencing aboriginal offenders. Section 718.2(e) imposes a duty on the sentencing judge to give the remedial purpose of the provision real force in relation to aboriginal offenders. Accordingly, the sentencing judge must take into account the unique systemic and background factors that contributed to the commission of the offence. Further, the judge must consider the type of sentence that is appropriate given the offender's specific aboriginal heritage or connection to an aboriginal community. The section is intended to provide the necessary flexibility and authority for sentencing judges to resort to a restorative model of justice in sentencing aboriginal offenders.

**Cecil Boutilier – Background**

[26] Mr. Boutilier (d.o.b. August 23, 1981) is 36 years old. His mother is Caucasian and his father of Mi'kmaq and African Nova Scotian heritage. Cecil Boutilier identifies with the Indian Brook First Nation where he lived as a youth with his aunt and uncle. As the *Gladue* Report author states referring to Mr. Boutilier, "…he stated that he is half Black and Mi'kmaq."

[27] In addition to speaking with Mr. Boutilier, the *Gladue* author interviewed his parents, other family members and psychologist. She also reviewed Mr. Boutilier's physician's clinical notes and records. On the third last page of her report, Ms. White set forth the following *Gladue* factors:

> 1. That Mr. Cecil Anthony Boutilier is a 36-year-old man of Mi'kmaq and Black decent and a non-status member of the Indian Brook Frist Nations.
>
> 2. That Mr. Cecil Anthony Boutilier demonstrates a willingness to address the underlying factors that contributed to the incident. And expresses a desire to seek treatment for grief and psychological harm to which he was a victim as a child.

3. That there is strong community support and culturally appropriate treatment available to Mr. Cecil Anthony Boutilier, including personal counselling within and after his release.

4. That Mr. Cecil Anthony Boutilier has personally experienced the adverse impact of many factors continuing to plaque aboriginal communities since colonization, including:

    - Substance abuse, in the immediate family, and among peers;
    - Family deterioration, separation and absent parents;
    - Low income and unemployment due to lack of education;
    - Abuse;
    - Poverty;
    - Overt and covert racism;
    - Domestic violence;
    - Abuse, emotional, verbal, mental, physical;
    - Lack of positive Socio-economic conditions;
    - Lack of stability;
    - Family member whom commit suicide;
    - Violence and victimization as a child;
    - Foster care-residential care;
    - Suicide;
    - Food and housing insecurity;
    - Homelessness;
    - Post-Traumatic Stress Disorder; and
    - Parental abandonment.

[28] The author goes on to recommend the sentence involve, "…appropriate cultural based counselling to deal with the underlying traumas he has suffered in his life." Ms. White also recommended, if possible, programs for Mr. Boutilier that follow, "a community-based and holistic healing philosophy that incorporates both western and traditional therapeutic approaches."

[29] In the IRCA Report, the author spoke of the African Nova Scotian experience and how this might have influenced Mr. Boutilier's involvement with criminal behavior. At pp. 15 – 16 of his Report, Mr. Wright put forth the following questions and answers:

2. How should this history and Mr. Boutilier's unique history and status an as ANS be considered when delivering a sentence;

    a. Though Mr. Boutilier's current crime resulted in a horrible fatality, the trajectory of his life and his criminal behavior leading up to this point is a tragic history of poverty, racial identity confusion, social exclusion and bullying […] childhood mental health programs, lack of responsive and adequate mental health diagnosis and treatment, increasing criminalization, and an inability to have his needs adequately met by the criminal justice system.

    b. Given the nature of his mental health problems and the likelihood that a prison environment aggravates this condition, a lengthy period of incarceration without significant mental health assessment and treatment would be challenging for Mr. Boutilier. Programming to address his racial identity development, his psychological trauma […] will be essential to his being securely and adequately housed.

3. What services or resources should be made available to Mr. Boutilier to support his rehabilitation and reintegration given his unique history and status as an ANS, and;

    a. Mr. Boutilier probably needs several things in terms of assessment and treatment resources. These include: […] a treatment plan that addresses his need for specific treatment to support a more positive racial identity development given his mixed-race heritage; a classification, placement and reintegration plan that actively treats his substance addiction with particular attention to considering seamless and sufficient methadone as a cornerstone.

4. What light does Mr. Boutilier's status as an ANS shed on the conclusions and recommendations that were offered in other reports that may be before the court?

    a. I have had occasion to speak with Ms. Whyte, the author of Mr. Boutilier's Gladue Report. These reports should really be read in tandem and likely make similar observations about Mr. Boutilier's circumstances.

[30] From speaking with Mr. Boutilier's mother, the PSR author noted that she reported her son was diagnosed at a young age with Attention Deficient Disorder, anxiety and depression. Further, Ms. Boutilier also thought her son was diagnosed with Post-Traumatic Stress Disorder and has had suicidal tendencies. Ms. Keeler

goes on to describe what can only be characterized as a very difficult upbringing. Although Mr. Boutilier has not been in any long-term relationships, he is the father to a now 20 year old daughter who resides in British Columbia.

[31] Mr. Boutilier left school in grade 7 and achieved his General Equivalency Diploma in 2009, while serving a federal sentence. A tattoo artist, Mr. Boutilier would like to take a business management program in the future so he might one day open a tattoo shop.

[32] Mr. Boutilier's employment history has been very limited. He reported to Ms. Keeler working in a garage changing tires, approximately 15 years ago. Other than that job, the only other formal employment he reported dates to his time residing in British Columbia in 2010 when he worked as a laborer for a high-rise construction company.

[33] Mr. Boutilier maintains he stopped drinking alcohol in 2011 and stopped abusing drugs in 2015. While in custody over years, he has completed numerous programs and is now of the view that alcohol and drug use is no longer an issue for him. Mr. Boutilier denies gambling issues; however, he admits to anger management issues over the years.

[34] Under the heading of "Offender Profile", the PSR reads as follows:

> Mr. Cecil Boutilier was interviewed for this report at the Central Nova Scotia Correctional Facility. He was explained the purpose of the Pre-Sentence Report by the undersigned, to which he stated he held an appropriate degree of understanding for the intent of same.
>
> In discussing the offence before the Court, the subject accepted responsibility for his involvement. He attributed his actions to needing to get home, stating, "I was surrounded, so it freaked me out, and I just wanted to get out of there". He went on to explain that things happened very fast, adding speeds increased, and it was raining out. Mr. Boutilier did not show remorse for the situation, claiming he was unaware at the time he had "hit anyone". The subject reported he has been stealing vehicles since he was 15 years old and that he never intended on hurting anyone, adding he "just needed a way home, because it was midnight and raining out".

[35] At the close of her report, the author notes:

> "Mr. Boutilier accepted responsibility for his involvement in the current offences before the Court, and he must be held accountable for his actions and be prepared to accept the consequences of his behavior."

[36] Given these rather contradictory statements of remorse and responsibility, the court was interested to hear from Mr. Boutilier at today's sentencing. When asked if he had anything to say before I passed sentence, Mr. Boutilier responded by expressing his sincere sorrow to Ms. Beaton and the entire Blackburn family.

**Purpose and Principles of Sentencing – s. 718 of the *Criminal Code***

[37] The fundamental purpose of sentence is to protect society and contribute, along with crime prevention initiatives, to respect of the law and the maintenance of a just, peaceful and safe society. The objectives of sentencing are set forth in s. 718 of *Criminal Code*. These repeated principles are deterrence, denunciation, separation of the offender from society, rehabilitation, reparation to the victims and promotion of a sense of responsibility for harm to victims.

[38] Section 718.2(a) requires me to consider any aggravating factors or mitigating circumstances in my determination of the nature and extent at sentence. As the Supreme Court of Canada noted in *R. v. Pham*, 2013 SCC 15, at para. 8:

> In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(*a*) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances.

<u>Aggravating Factors</u>

a. Mr. Boutilier was prohibited from driving at the time of the offences;

b. He was under a Probation Order when the offences occurred;

c. The circumstances of Mr. Boutilier's March 19, 2008 sentencing are relevant. The matter involved three distinct s. 249.1(1) offences and

> two distinct s. 259 offences, one of which involved a flight from police in a stolen vehicle. In the course of that chase, Mr. Boutilier struck an oncoming vehicle and then crashed a stolen car into a median after which he abandoned the wreck and his co-accused. He fled the scene where he was chased by a K-9 unit; and
>
> d. Criminal record – Mr. Boutilier has a significant criminal record. There are a total of fifty (50) prior convictions and many are for offences with nearly identical circumstances. For example, there are three convictions for driving while disqualified under s. 259 and three convictions for flight under s. 249.1(1).

[39] I would add that the resulting collision with the car resulted in death of the perfectly innocent Harry Blackburn, approximately two hours later. I can only imagine the toll this has exacted on his family as addressed in the VIS submitted and read by the late Mr. Blackburn's sister, Carolyn Beaton.

Mitigating Circumstances

a. Following the preliminary inquiry and approximately four and a half months before his scheduled trial, Mr. Boutilier pled guilty; and

b. Although there is some question of Mr. Boutilier's remorse (as expressed in the Crown's brief and PSR), on the basis of submissions of the Defence, *Gladue* Report, IRCA Report and Mr. Boutilier's comments to the Court today, I am prepared to accept Cecil Boutilier expresses remorse for his actions.

**Guiding Law on Sentence**

[40] The Supreme Court of Canada in *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, at para. 43 sets forth sentencing principles which I as sentencing judge must consider:

> The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which

> objective or objectives merit the greatest weight, given the particulars of the case. The relative importance [page233] of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.

[41] In an advancing their recommendation of eleven years incarceration, the Crown relies on the below cases as follows:

> In *R. v. S.(J.J.)* the offender, who was not an aboriginal person, plead guilty to criminal negligence after stealing a car, driving recklessly to evade police and striking an oncoming vehicle, killing the driver. The offender had never been incarcerated, had two unrelated criminal convictions and some *Motor Vehicle Act* infractions. The offender received a sentence of nine years.
>
> In *R. v. McNabb* the Saskatchewan Provincial Court sentenced an aboriginal offender who stole a truck and crashed into another car, killing the driver, after which he fled the scene. Mr. McNabb had a criminal record nearly as extensive as Mr. Boutilier's which included related convictions for circumstances involving flight in a stolen vehicle. The offender received a sentence of ten years.
>
> In *R. v. Akapew* the Saskatchewan Court of Appeal sentenced an aboriginal offender who was the passenger in a stolen car driven on a chase. The driver hit a police officer and then drove at oncoming vehicles, ultimately striking one and killing a child. The offender had a terrible record for driving related offences, with three prior dangerous driving convictions, 16 prior convictions for either driving while impaired or disqualified and two prior convictions for flight from police. Despite his conviction as a party to the offence, and not as the driver, the Court imposed a sentence of 12 years and six months.

[42] In their brief, the Defence at paras. 51 – 60, argues the three cases relied on by the Crown are distinguishable. For example, in *R. v. S.(J.J.)* the Defence notes:

- The accused was engaged in a high speed chase while fleeing police prior to becoming involved in the accident that took the life of a mother of two. The accident occurred in the middle of the afternoon as opposed to 11 p.m. at night.

- The accused had a higher degree of moral culpability since he planned how to evade the police.

[43] In *R. v. McNabb*, the Defence similarly submits that the accident in question occurred around noon time as opposed to midnight. Further, the facts involved drinking and driving and, "running [driving] through the heart of the downtown business district". With reference to the specific egregious facts, the Defence once again argues that Mr. McNabb's moral culpability is much higher than Mr. Boutilier's. In oral argument it was pointed out that Mr. McNabb had on three occasions got back in his vehicle to drive when he could have stopped.

[44] With respect to *R. v. Akapew*, the Defence points out that Mr. Akapew had 75 criminal convictions, including three dangerous driving convictions. Further, the Defence makes the distinction that Mr. Akapew's offences and circumstances surrounding his flight from police are much more aggravating than those with Mr. Boutilier. I would add that on questioning from the Court the Crown acknowledged Mr. Boutilier's crimes are "not as bad" as Mr. Akapew's.

[45] The Defence referred to several Nova Scotia cases, the most recent of these from the Court of Appeal is *R. v. Shand*. Justice Bateman upheld an eight year sentence in respect of the accused who, driving while impaired by alcohol, caused the death of a passenger and bodily harm to the three other passengers in his vehicle. While reviewing the decision of the (then) trial judge, Justice Saunders, Justice Bateman had this to say:

> He rejected Mr. Shand's evidence as to how the accident occurred, accepting that of the accident reconstructionist. He concluded, from a review of the Pre-Sentence Report for this 38 year old repeat offender, that his prospects for reformation and rehabilitation are poor. He correctly identified that the principle emphasis for such an offence is general deterrence but found a need for specific deterrence as well. He noted that Mr. Shand had still not come to understand the tragedy of his actions; had not taken advantage of previous opportunities to deal with his long-standing substance abuse problems; that he was grossly impaired while committing this offence; that throughout his life he had demonstrated irresponsibility; that through his actions in committing these offences he had demonstrated callous disregard for the lives and safety of others, resulting in tragic consequences; that his previous periods of incarceration in a federal institution had not provoked any lasting, positive change; that the guilty plea by Mr. Shand had come only after several court appearances, including the preliminary inquiry; and that, while Mr. Shand had owned several automobiles throughout his life, he had never held a driver's licence.
>
> [Emphasis added]

**Analysis and Disposition**

[46] I find a number of the unfortunate characteristics of Mr. Shand present with Mr. Boutilier. I would add that I do not consider *Shand* to be an "outlier" but rather, sound authority from our Court of Appeal. In any event, on the basis of my review of the entirety of the submissions and caselaw, I am of the view that Mr. Boutilier is a habitual car thief. Regrettably, he has shown no hesitation in putting other drivers at risk when pursued by police, or (per the ASF) vehicle owners. This time his actions resulted in the death of the completely innocent Harry Blackburn. Indeed, the victim was merely lawfully driving his vehicle on a summer evening when he was hit by the stolen vehicle driven at a very high rate of speed by Mr. Boutilier. I am accordingly, drawn to the Crown's submission that only the separation of Mr. Boutilier from society will ensure the public's safety. Having said this, I am mindful of Defence arguments and find that certain of the cases relied on by the Crown provide even more egregious circumstances that what is present here. In the result, I am of the view that a fit and appropriate sentence is as follows:

| **Count** | **Charge** | **Sentence** |
|---|---|---|
| Count 1: s. 220(b) | Criminal Negligence Causing Death | 6.5 years |
| Count 2: 252(1) | Failing to Stop | 1 year consecutive |
| Count 3: 333.1 | Theft of Motor Vehicle | 6 months concurrent |

[47] Further, I grant the ancillary orders as requested by the Crown; namely:

i) DNA Order (primary designation) on Count 1; and

ii) s. 259 Order (life)

Remand Credit

[48] The Crown seeks to deny an enhanced credit for Mr. Boutilier's time spent in pre-trial custody based on his institutional incidents. As the Defence acknowledges, these are serious incidents involving fighting, weapons and

possession of contraband. In his testimony, Captain Miller spoke to the Offender Incident Report documenting Mr. Boutilier's various breaches while incarcerated.

[49] In *R. v. Summers*, 2014 SCC 26, *R. v. Carvery*, 2014 SCC 27 and *R. v. Clarke*, 2014 SCC 28, the Supreme Court of Canada interpreted the changes to pre-trial custody as a factor on sentence contained in the *Truth in Sentencing Act*. With these decisions the Supreme Court has clarified how s. 719(3) and (3.1) of the *Criminal Code* are to be interpreted and applied to pre-sentence custody. The Court has adopted an approach which re-affirms and applies the analytical framework it set out in *R. v. Wust*, [2000] 1 S.C.R. 455, to the changes created by the *Truth in Sentencing Act*.

[50] The Court held in *Summers*, at para. 7, that:

> …while the *Truth in Sentencing Act* caps pre-sentence credit, it does not limit the 'circumstances' that justify granting credit…[had] Parliament intended to alter the well-established rule that enhanced credit compensates for the loss of eligibility for early release, it would have done so expressly.

[51] The Court recognized that in most cases an accused offender will qualify for early release and almost surely for statutory release. In terms of when a one for one credit might be appropriate rather than an enhanced credit, the Supreme Court provided the following potential scenarios at para. 48:

> Where an accused falls under an explicit exception to s. 719(3.1) (for instance, because she has been detained for breach of bail conditions), the one-for-one cap set by s. 719(3) will apply. Moreover, enhanced credit need not be granted in every case. <u>For example, when long periods of pre-sentence detention are attributable to the wrongful conduct of the offender, enhanced credit will often be inappropriate. Section 719(3) continues to exist for such cases</u>.
>
> [Emphasis added]

[52] The Supreme Court concluded, at paras. 70 and 71:

> …the analytical approach endorsed in *Wust* otherwise remains unchanged. Judges should continue to assign credit on the basis of the quantitative rationale, to account for lost eligibility for early release and parole during pre-sentence custody, and the qualitative rationale, to account for the relative harshness of the conditions in detention centres." Therefore, the "loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is

> unlikely. Of course, a lower rate may be appropriate when detention was a result of the offender's bad conduct, or the offender is likely to obtain neither early release nor parole.
>
> [Emphasis added]

[53] In accordance with s. 719, I must state my reasons for limiting remand time (*R. v. Ryan*, 2017 NSCA 32, at para. 17). Further, as noted in the Court of Appeal's majority decision of Farrar, J.A. in *R. v. Murphy*, 2015 NSCA 14, at paras. 28 and 54:

> Reading s. 719 as a whole, the structure of the section is to both limit the sentencing judge's discretion to award remand credit and to provide transparency for the thought process behind any decision to award credit. The purpose of s.s. (3.2) and (3.3) is to require a sentencing judge to disclose the amount of remand credit given and the reasons for that award.
>
> …
>
> In future, to avoid uncertainty and allow meaningful review on appeal, it may be preferable for the sentencing judge to outline the individual sentences imposed on each of the counts for which an accused has been convicted and arrive at a total actual sentence and then credit the accused with the time spent on remand leaving an effective custodial sentence.

[54] I have already outlined the individual sentences imposed on each of the three counts in this matter. As for the credit for Mr. Boutilier's time spent on remand, I am of the view that this should be at a rate of 1:1. In this regard I do not believe that Mr. Boutilier deserves to be afforded an enhanced rate. I say this with reference to the Supreme Court of Canada decisions referencing the *Truth and Sentencing Act* and the Offender Incidents Report, addressed by Captain Miller during his testimony.

[55] Pursuant to *Summers*, enhanced credit is not automatic. In denying enhanced credit I am mindful of Mr. Boutilier's long criminal record, his proclivity to immediately reoffend upon release and his poor behavior during his periods of incarceration.

[56] Given my decision that Mr. Boutilier shall receive 1:1 credit, on the math (agreed to by the parties) the credit amounts to 769 days which shall be subtracted from the overall sentence; i.e., the overall sentence amount of 7.5 years less the 769 days (2 years and 39 days).

**Summary**

[57] To re-capitulate, the sentence shall be as follows:

| Count | Charge | Sentence |
|---|---|---|
| Count 1: s. 220(b) | Criminal Negligence Causing Death | 6.5 years<br><br>DNA Order (primary designation)<br><br>s. 259 Order (life) |
| Count 2: 252(1) | Failing to Stop | 1 year consecutive |
| Count 3: 333.1 | Theft of Motor Vehicle | 6 months concurrent |

[58] Remand credit shall be at a rate of 1:1 leaving a total sentence of 7.5 years less 2 years and 39 days.

[59] Mr. Boutilier shall be afforded the counselling and other therapeutic remedies recommended by the authors of the *Gladue* and IRCA Reports as available while in custody.

[60] There will also be a victim fine surcharge of $200 on each count for a total of $600 payable within one year of Mr. Boutilier's release from custody.

[61] The remaining counts are hereby dismissed.

Chipman, J.